172

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No. 10-157

IN THE

Supreme Court of the United States

SPRINT SPECTRUM L.P. d/b/a SPRINT PCS,

Petitioner,

v.

CHRISTOPHER W. HESSE and NATHANIEL OLSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6	i
TABLE OF CONTENTS	II
TABLE OF CITED AUTHORITIES	III
I. THE NINTH CIRCUIT'S NEW STANDARD FOR COLLATERAL REVIEW OF A STATE COURT CLASS SETTLEMENT CONFLICTS WITH THIS COURT'S FULL FAITH AND CREDIT ACT JURISPRUDENCE; RESPONDENTS ARE MISTAKEN TO SUGGEST OTHERWISE	1
II. CONTRARY TO RESPONDENTS' ASSERTION, THE NINTH CIRCUIT'S DECISION NULLIFIES SETTLEMENT CLASS MEMBERS' OBLIGATIONS TO OPT OUT OF OR OBJECT TO CLASS SETTLEMENTS	8
CONCLUSION	12

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Brown v. Ticor Title Insurance Co.,
982 F.2d 386 (9th Cir. 1992) 2, 7

Durfee v. Duke,
375 U.S. 106 (1993) 9

Epstein v. MCA, Inc.,
179 F.3d 641 (9th Cir. 1999) 2, 9, 10

Foucha v. Louisiana,
504 U.S. 71 (1992) 3

In re General American Life Insurance Co. Sales Practices Litigation,
357 F.3d 800 (8th Cir. 2004) 2

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998) 2, 10

Krell v. Prudential Insurance Co. of America (In re Prudential Insurance Co America Sales Practice Litigation Agent Actions),
148 F.3d 283 (3d Cir. 1998) 11

Kremer v. Chemical Construction Corp.,
456 U.S. 461 (1982) 8-9

Lambert v. Wicklund,
520 U.S. 292 (1997) 3

Cited Authorities

Page

Matsushita Electric Industrial Co. v. Epstein,
516 U.S. 367 (1996) ..... *passim*

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 8, 10

Reed Elsevier, Inc. v. Muchnick,
— U.S. —, 130 S. Ct. 1237 (2010) 10

Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Ass'n,
455 U.S. 691 (1982) 7

FEDERAL STATUTES AND RULES

28 U.S.C. § 1738 ..... *passim*

Fed. R. Civ. P. 23(e) 9

Sup. Ct. R. 14.1 ..... 1, 7

STATE STATUTES

Kan. Stat. Ann. § 60-223(a) 5, 9

Rather than addressing head on the two questions presented by the petition for a writ of certiorari, respondents obfuscate. They suggest, without basis, that the Court should not review the Ninth Circuit's decision because it is purportedly fact specific or grounded solely in state law.[1] Rather, the Ninth Circuit's decision is founded directly on its erroneous view of a federal court's power to conduct a collateral review of a prior state court class settlement. When the Ninth Circuit fashioned a new standard for doing so, that court placed itself in direct conflict with *Matsushita v. Epstein* and the Full Faith and Credit Act jurisprudence of this Court and the other circuit courts. Because the questions presented have a far-reaching impact on the scope of federal courts' review of such class settlements, the petition should be granted. Respondents' sleight of hand in opposing the petition is exposed below.

I. THE NINTH CIRCUIT'S NEW STANDARD FOR COLLATERAL REVIEW OF A STATE COURT CLASS SETTLEMENT CONFLICTS WITH THIS COURT'S FULL FAITH AND CREDIT ACT JURISPRUDENCE; RESPONDENTS ARE MISTAKEN TO SUGGEST OTHERWISE

In the appeal below, the Ninth Circuit reviewed a prior class settlement that a state court had approved as satisfying all due process requirements and that

[1] To the extent that respondents attempt to reformulate the questions presented, they are not permitted to do so in the absence of a cross-petition for a writ of certiorari, which cross-petition respondents have not brought. *See* Sup. Ct. R. 14.1(a). The petition fully presents all the issues that the Court need decide.

barred respondents' claims here. Under these circumstances, the scope of the Ninth Circuit's review is restricted. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 377-79 (1996) ("Matsushita"). A state court "judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is *presumptively entitled* to full faith and credit under the express terms of the [Full Faith and Credit] Act." *Id.* at 374 (emphasis added). On collateral review of a state court judgment approving a class settlement, a federal court must defer to the state court's findings that the settlement met all due process requirements and credit the judgment rendered by the state court. *Matsushita*, 516 U.S. at 378-79;[2] *Epstein v. MCA, Inc.*, 179 F.3d 641, 649 (9th Cir. 1999), *cert. denied*, 528 U.S. 1004 (1999); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390-91 (9th Cir. 1992); *see In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 357 F.3d 800, 805 (8th Cir. 2004) ("we have no way to criticize the judgment of the class representative [on collateral review]"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023-24 (9th Cir. 1998) (upholding lower court's judgment approving class settlement even where lower court's findings regarding the adequacy of representation requirement were "almost conclusory").

The Ninth Circuit's decision, however, would eviscerate this rule. The only reason the Ninth Circuit saw fit to disturb the subject state court judgment was because the Ninth Circuit believed the Kansas state

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[2] Respondents misread *Matsushita* when they claim that the Court "did not address the due process question" as part of that case. Opp'n at 18.

court did not explain its due process findings as precisely as the Ninth Circuit itself might have done. Specifically, the Ninth Circuit found fault with the Kansas state court's judgment because it did not expressly state that the class representative could have prosecuted each claim that a class member might release as part of the settlement. App. at 11a ("[b]ecause that [B&O tax] question [(the subject of respondents' federal court action)] was not addressed with any specificity by the Kansas court, it is a proper subject for collateral review"). In other words, the Ninth Circuit believed that the Kansas state court should have done a better job at assessing the adequacy of the named plaintiff to represent the interests of the settlement class. But the purpose of the Court's Full Faith and Credit Act jurisprudence is to avoid just what the Ninth Circuit did here, namely, to second guess the state court's judgment. The conflict between the Ninth Circuit's impermissible second-guessing of the state court's due process analysis and this Court's Full Faith and Credit Act jurisprudence presents a federal question of exceptional importance for the Court to resolve on certiorari. *See Foucha v. Louisiana*, 504 U.S. 71, 75 (1992); *Lambert v. Wicklund*, 520 U.S. 292, 293, 299 (1997) (per curiam).

The propositions set forth in respondents' opposition only underscore the need for the Court to review the Ninth Circuit's decision. Pared to its essence, respondents' opposition requests that the Court condone the Ninth Circuit's nullification of binding precedent. As respondents would have it, a federal court should conduct a searching collateral review of any prior

state court class settlement and may do so with impunity as long as it describes its analysis as "fact based" or "state-law based" rather than "due-process based."

Respondents assert, implausibly, that the Ninth Circuit's impermissible second-guessing of the state court's due process determination immunizes the Ninth Circuit's decision from review. Specifically, respondents state that the Ninth Circuit's "fact-bound question of what the Kansas courts decided is plainly not worthy of review by this Court." Opp'n at 3. Respondents miss the point. It is not the fact-bound aspect of the Ninth Circuit's order that this Court should review but, instead, the Ninth Circuit's erroneous decision to reexamine the facts in the first place.

In addition, respondents posit that the Ninth Circuit's decision is not susceptible to review on certiorari because part of the decision rested on "state-law ground[s] ... entirely distinct from the due process issues that Sprint [PCS] wishes the Court to address." Opp'n at 9, 10-11, 14. This is incorrect. Rather, the Ninth Circuit *predicated* its review of the preclusive effect of the state court judgment on its impermissible second-guessing of the state court's due process determination. In particular, the Ninth Circuit held: "Especially relevant to our determination that the claims lack an identical factual predicate is our observation ... that the *Benney* Class Plaintiff did not adequately represent the [interests of] Plaintiffs [here]." App. at 19a. Again, under the Full Faith and Credit Act, 28 U.S.C. § 1738, the Ninth Circuit could not conduct its own due process analysis

where the state had approved the class settlement as satisfying all due process requirements.[3]

Furthermore, respondents are wrong when they suggest that the Kansas state court failed to assess the adequacy of the named plaintiff to represent the interests of the class and that the Ninth Circuit was justified in conducting its own searching collateral review of the propriety of the state court class settlement. Opp'n at 20. To the contrary, in preliminarily approving the class settlement, the state court expressly held that "[t]he adequacy of representation requirement is met here because the named Class Representatives have the same interests as the members of the Class." App. at 52a. The state court also held that the class settlement "substantially fulfills the purposes and objectives of" a class action as set forth in the Kansas class action rule. App. at 80a-81a. That rule permits certification of a class only, among other bases, where "the representative parties will fairly and adequately protect the interests of the class." Kan. Stat. Ann. § 60-223(a).

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[3] Respondents' attempt to recast the petition as one that concerns merely an intra-circuit conflict is also without avail. Opp'n at 21-22. As set forth in the petition, the Ninth Circuit's decision conflicts not only with prior Ninth Circuit precedent but equally with the precedent of this Court and that of the other circuit courts of appeal, and with the Full Faith and Credit Act. Pet. at 13. Respondents do not address, much less contest, the impermissible nature of the Ninth Circuit's violation of the Full Faith and Credit Act, as that statute has been interpreted by this Court, a tacit concession that the issue is appropriate for review on certiorari.

Moreover, in certifying the settlement class, the Kansas state court considered objections that addressed *the very question presented here* – namely, the adequacy of representation of the named plaintiff in light of the scope of the settlement release.[4] App. at 78a-79a. Indeed, an objector from respondents' home state, Washington, specifically challenged the named plaintiff's ability to adequately represent the class members, including members from Washington. App. at 119a-121a. Other class members objected that the named plaintiff "[f]ailed to [a]dequately [r]epresent the [c]lass," was "conflicted and inadequate as a matter of law," and that the settlement "carries the indicia of inadequate representation." App. at 141a. As respondents concede, the objections to a class settlement need only be "substantially similar to [those of a plaintiff in a later action]" to raise the issue sufficiently to preclude subsequent review. Opp'n at 21. It is clear that the objections considered by the Kansas state court are substantially similar, if not the same, as respondents' belated objections here and that the Ninth Circuit's decision contravenes the established Full Faith and Credit Act jurisprudence on this basis, as well.[5]

[4] Respondents' contention that the Kansas state court "did not expressly consider the substance of these objections or make any findings," Opp'n at 6, 23, is not true. The state court expressly stated that it "has considered each of the objections properly made before this Court, and concluded that they are without merit." App. at 89a.

[5] Respondents are not correct when they assert that petitioner waived its right to present materials regarding the Kansas state court's adequacy of representation determination. (Cont'd)

Thus, none of respondents' arguments for denying the petition has any merit. A federal court cannot collaterally second guess a state court's determination that a class settlement satisfies due process and thereby substitute its judgment for the informed judgment of the state court. *Matsushita*, 516 U.S. at 378-79; *Brown*, 982 F.2d at 390 ("[o]n collateral attack of a judgment ... we will not second-guess a prior decision" finding adequate representation). Even where the state "court may have made an error of law with respect to a particular question[, it] does not deprive its decision of the right to full faith and credit, so long as that court fully and fairly considered its jurisdiction to adjudicate the issue." *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 709 n.16 (1982) (reversing and remanding with instructions to afford full faith and credit to state court decision). Allowing the Ninth Circuit decision to stand, however, would sanction the ability of federal courts to revisit without any restraint the decision-making process of state courts, rendering the Full Faith

(Cont'd)

Opp'n at 6. Rather, any interstices in the District Court summary judgment record result from *respondents'* failure to contest the adequacy of the state court plaintiff to represent their interests or the state court's due process analysis. As the District Court held, "[respondents] do not argue that their rights were not justly protected by adequate representation." App. at 44a. Respondents cannot use *their* failure to bar petitioner from informing the Court of the complete state court record particularly where the Court's rules permit petitioner to do so. *See* Sup. Ct. R. 14.1(i)(vi). A contrary result would preclude petitioner from seeking review of issues which respondent never raised, let alone briefed, and as to which the Ninth Circuit never requested the submission of a supplemental record.

and Credit Act and this Court's jurisprudence interpreting that statute meaningless. For this reason, the petition presents a question of exceptional importance, and it should be granted.

II. CONTRARY TO RESPONDENTS' ASSERTION, THE NINTH CIRCUIT'S DECISION NULLIFIES SETTLEMENT CLASS MEMBERS' OBLIGATIONS TO OPT OUT OF OR OBJECT TO CLASS SETTLEMENTS

In rendering its decision, the Ninth Circuit paid no heed to the undisputed facts that (1) respondents received actual notice of the state court class settlement, (2) the release in the state court settlement encompassed respondents' claims here,[6] (3) respondents were represented by counsel at the time they received notice, but nevertheless (4) respondents failed to appear, object, or opt-out of the state court action. App. at 4a-5a, 29a, 36a-37a, 44a. Neither federal nor state law permits settlement class members to sit on their rights in state court and then, if the judgment is not to their liking, collaterally raise objections to the settlement in a subsequent action. Rather, such settlement class members must timely exercise their rights in state court or forfeit them. *See Matsushita*, 516 U.S. at 377-78, 379; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813-14 (1985); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461,

[6] Contrary to respondents' assertion, Opp'n at 6, the release incorporated into the state court judgment was not narrower than the release in the parties' settlement agreement. Indeed, even the Ninth Circuit noted that the Kansas state court "included its own *expansive* release" in its final order. App. at 6a (emphasis added).

465 n.4 (1982); *Epstein*, 179 F.3d at 648; *see also* Fed. R. Civ. P. 23(e)(4), (5); Kan. Stat. Ann. § 60-223(e)(4), (5). If allowed to stand, the Ninth Circuit's decision would have the effect of nullifying state class action rules that require settlement class members to opt out of or object to a settlement before the state court's disposition of the proposed settlement. Indeed, under the Ninth Circuit's reasoning, Rule 23(e) of the Kansas Rules of Civil Procedure, and the analogous rule in approximately 38 other states, would be rendered meaningless.

Furthermore, by effectively permitting post-settlement opt outs, the Ninth Circuit's decision undermines the ability of litigants to settle class actions altogether. The finality of state courts' settlement authority will be impaired, because there will always be a threat of subsequent litigation by class members who – like respondents here – did nothing in response to a state court class settlement, only to later oppose the settlement in a subsequent federal court action. The impact of the Ninth Circuit's decision on state court class action rules and on the comity owed to state courts under the Full Faith and Credit Act presents a question of exceptional importance for the Court to resolve on certiorari. *See Durfee v. Duke*, 375 U.S. 106, 107, 116 (1993).

Respondents posit, however, that the Court should not review the Ninth Circuit's decision on the basis that respondents were not obligated to opt out of the Kansas state court settlement. Specifically, respondents assert that they had no obligation to exclude themselves from the state court action because their claims here were

purportedly not identical to the state court claims. Opp'n at 29. But this is not the law. As stated above, respondents' right to contest the state court settlement arose within the state court action and terminated upon their failure to do so. *See Matsushita*, 516 U.S. at 379; *Phillips Petroleum Co.*, 472 U.S. at 813-14; *Epstein*, 179 F.3d at 648.

In any event, respondents' claims here arise from the exact same factual predicate as those in the state court action. Both actions challenged petitioner's allegedly standard form contracts that purportedly did not disclose sufficient information about the surcharges that would be included on customer invoices.[7] Furthermore, two actions share the same factual predicate even where the specific surcharges contested in this action differ from those contested in the state court action. *Reed Elsevier, Inc. v. Muchnick*, — U.S. —, 130 S. Ct. 1237, 1242-43, 1249 (2010) (district court had jurisdiction to approve a class settlement involving the release of claims that certain class members could not have asserted before the district court);[8] *Hanlon*, 150 F.3d at 1022-24 ("slightly differing remedies based on state statute or common law" not sufficient to create a conflict of interest); *see Epstein*, 179 F.3d at 642-43, 650 (rejecting collateral due process challenge even

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[7] Moreover, this matter and the state court matter assert virtually identical causes of action, namely the alleged violation of state consumer protection acts, breach of contract, and unjust enrichment.

[8] Contrary to respondents' assertion, Opp'n at 25-26, *Reed Elsevier, Inc.* is directly applicable to the questions presented for review.

though state class members could not have litigated federal class members' claims); *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions)*, 148 F.3d 283, 325-26 (3d Cir. 1998) (class action settlement release enforceable even though the judgment approving the settlement did not specifically review each claim to be released).

Nor is respondents' argument correct that the claims they released in the state court settlement were somehow later revived. Opp'n at 16. As the District Court ruled:

> the plain language of the [Benney Final Order] ... make[s] a distinction between *claims* that arise after the effective date and *damages* that accrue thereafter, but flow from claims that arose prior to the effective date. The order releases Sprint from liability for "*claims* which relate in *any way* to allegations that, on or before the Effective Date ..., Sprint failed properly to disclose or otherwise improperly charged for surcharges...."

App. at 45a. (emphasis in original). Respondents' claims here relate to the allegedly improper disclosure of surcharges and arose prior to the effective date of the settlement. By failing to opt out of the settlement, respondents released their claims regardless of whether respondents would have continued to accrue damages after the effective date had the claims not been released.

Because the Ninth Circuit's decision would nullify settlement class members' obligations to opt out of or

object to class settlements and would render meaningless those provisions of state court class action rules, the petition presents a question of exceptional importance, and it should be granted.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in its petition for a writ of certiorari, Sprint Spectrum L.P. d/b/a Sprint PCS respectfully requests that the Court grant the petition.

Dated: October 12, 2010

Respectfully submitted,

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